

UTAH DEPARTMENT OF TRANSPORTATION

IBLA 81-279

Decided March 8, 1982

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting in part amended application for Federal highway right-of-way U-071161.

Set aside and remanded.

1. Rights-of-Way: Federal Highway Act

An application by a state highway department for a material site right-of-way on public land is properly denied where the applicant fails to demonstrate that the material is reasonably necessary for the construction or maintenance of a highway or where such disposition would not be consistent with other public purposes as determined by the Bureau of Land Management. Where the application is denied on the basis of a determination that it would preempt the public's only available source of cinders within 40 miles and appellant contradicts this by identifying other public sources, the decision rejecting the application will be set aside and the case remanded for further consideration of alternatives that would meet the needs of the applicant without sacrificing other public purposes.

APPEARANCES: Alex E. Mansour, District Director, Utah Department of Transportation.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Utah Department of Transportation appeals from the December 22, 1980, decision of the Utah State Office, Bureau of Land Management (BLM), rejecting in part its amended application for material site right-of-way U-071161.

Appellant's reasons for bringing this appeal can be more fully appreciated if we set forth the history of this material site as reflected in the administrative record. The existing right-of-way for a cinder deposit was first granted on August 1, 1961, for the SE 1/4 NE 1/4, sec. 21, T. 42 S., R. 12 W., Salt Lake meridian, containing 40 acres. In 1967, BLM asked the State about the relinquishment of certain rights-of-way, and determined the existing right-of-way was not to be released because it would be used for maintenance. In May 1978, BLM issued a decision requiring appellant to show proof of use and this was submitted. A 1979 examination, however, established that although the site had shown signs of past use, it had not been used in recent years. The State was requested to relinquish the site, but the State indicated that the material site would be put into more frequent use. Accordingly, BLM accepted the State's proof of use by decision dated October 11, 1979.

Although the existing right-of-way had not been used for some time, the Utah Department of Transportation had been removing cinders from a deposit approximately one-quarter of a mile southeast of the existing right-of-way. Although this removal was unauthorized, the Dixie Resource Area manager determined not to pursue a trespass settlement. On November 9, 1979, the Utah Department of Transportation filed an application to amend its existing right-of-way to include the site of this trespass. The application sought to add the E 1/2 E 1/2 NE 1/4 SE 1/4, sec. 21; S 1/2 NW 1/4 SW 1/4, SW 1/4 SW 1/4, sec. 22, T. 42 S., R. 12 W., Salt Lake meridian. BLM's decision rejecting this amendment is the subject of this appeal.

The decision noted that appellant presently holds two other material site rights-of-way within 9 miles of this proposal: U-43039, a fill dirt site, and U-060729, a cinder material site. These are in addition to the deposit included in the existing right-of-way. The decision further noted that the expansion would include the only source of cinders for public use within 40 miles, and concluded that issuance of the grant would be contrary to the public interest and inconsistent with management programs. <sup>1/</sup> On appeal, although appellant offers no further demonstration of its need for the site, it contradicts BLM's determination that the pit is the public's only source of cinders within 40 miles by citing the existence of other pits in the area. Appellant also attacks the dedication of the site to public use by asserting that the public has no legal access to the site. Appellant is amenable to dividing the site into separate areas of State and public use.

[1] An application by a state highway department for enlargement of a materials site right-of-way is properly denied where the applicant fails to demonstrate that the materials contained therein are reasonably necessary for the construction or maintenance of a highway or where such disposition is not

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<sup>1/</sup> This reference to "management programs" is unclear. Although the phrase recurs in other documents in the file, the record contains no evidence of any established program, as such, affecting this site. Consequently, we are precluded by regulation from basing our decision on this particular rationale. See 43 CFR 4.24.

consistent with other public purposes. See 23 U.S.C. § 317 (1976); 43 CFR Subpart 2821. Appellant has access to cinder deposits contained in the existing right-of-way and another one 9 miles away. However, the proposed right-of-way is preferable to the existing one because the cinder deposit in the existing site is of lower quality, containing much dirt. The proposed right-of-way is preferable to the site 9 miles distant because of the savings from the reduced hauling distance. Nevertheless, appellant has not shown that exclusive access to the entire deposit is reasonably necessary, and its application for such may be properly denied on that basis. The documents in the file, however, establish that appellant's lack of need was not the primary reason for rejecting its application. Rather, BLM's primary concern was that granting appellant's application would preclude public use of the deposit. Indeed, BLM was willing to grant the application if appellant would make the site available for public use. 2/ However, appellant is not willing to share the site with the public because the State would then become responsible for preventing hazards created by public users. 3/ As noted above, appellant would agree to dividing the site into two use areas. BLM considered this alternative and rejected it because the amount of cinders available to each user would be reduced and the long-term productivity of the site would be less. BLM's evaluation of alternatives is set forth in the Environmental Analysis and Land Report.

In rejecting appellant's application, BLM clearly attempted to balance the needs or desires of appellant with those of the public at large. However, striking an appropriate balance requires an accurate appraisal of the needs of both the public and appellant. Appellant contradicts BLM's determination that the pit constitutes "the only source of cinders for public use within 40 miles" by citing in its statement of reasons a number of sources

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2/ This is indicated in the following explanation provided by the Dixie Resource Area manager for rejecting the application:

"On June 30, 1980, I met and discussed the need for the Cinder Pit with Mr. Elwood Jensen (UDOT). He felt the pit was needed for future maintenance and upgrading of Highway 59. I reminded Mr. Jensen of the two existing material site right-of-ways. His response was that the site would provide a shorter haul for the west end of the highway. However, in the conversation, Mr. Jensen stated that they had hauled gravel for their asphalt clear from LaVerkin because cinders are a poor aggregate for asphalt. These cinders will be used for fill on highway slopes and asphalt. The existing cinder pit (U-060729) still has a large volume of material, also there is material available for slopes in (U-43039).

"I asked Mr. Jensen if they would be agreeable to a common use pit with the general public. Mr. Jensen's response was that they did not want the responsibility associated with accidents which might occur in a dual situation.

"Based on this analysis and the economic study completed by Steve Durkee, it is my decision to reject UDOT's proposed amendment and retain the material for future public use. Although it will cost UDOT more to haul cinders from just one pit, approval of the application would be contrary to the public interest and inconsistent with management programs." 3/ The explanation in n.2, supra, makes this clear, as does appellant's statement of reasons.

available to the public which appellant alleges BLM did not consider. Therefore, the case should be remanded for BLM to reconsider the relative need of the public and appellant in light of these assertions.

If BLM adheres to its original decision to devote the site exclusively to general public use after taking into account the public cinder sources identified by appellant, the record should demonstrate that the public's future need for cinders in the proposed right-of-way is greater than appellant's in light of the sources available to each. Evidence of public demand should be furnished. If the record does not demonstrate this, BLM and appellant should reconsider division of the site into separate use areas. Although the Environmental Analysis and Land Report suggests that total recovery from the site and its long-term productivity would be diminished by divided use, this should only occur as the development of the separate areas approaches the boundary between the use areas. This adverse effect may be avoided if BLM granted appellant a short-term right-of-way with a stipulation limiting use to a specific area for a specific volume of material instead of fixing a permanent use area boundary now. The right-of-way could be renewed from time to time with a stipulation enlarging the State use area as reasonably necessary. As the area of State development nears the area of public use, BLM could then determine whether the State or the public would be given access to the remainder of the material simply by granting or denying the State's application for renewal of the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to the Utah State Office for further action consistent with this opinion.

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Anne Poindexter Lewis  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge

